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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

LEE MAX BARNETT, Petitioner, v. THE SUPERIOR COURT OF BUTTE COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	C051311 (Super. Ct. No. 91850) ORDER MODIFYING OPINION AND DENYING REHEARING [CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on December 5, 2006, be modified as follows:

1. On page 47, at the end of the first paragraph, insert a closing quotation mark (”) immediately following the phrase “would have been different.’” and delete the remaining text preceding the citation to *In re Sassounian* (1995) 9 Cal.4th 535. Following that citation, insert the following new paragraph:

In determining the materiality of evidence that was not disclosed, "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 434 [131 L.Ed.2d at p. 506].) Furthermore, the materiality of the evidence is "considered collectively, not item by item." (*Id.* at p. 436 [131 L.Ed.2d at p. 507].)

2. Also on page 47, at the end of the second paragraph, delete the text following the phrase "it must be of such significance" (not including footnote 15) and insert the following text in its place:

considered collectively with any other evidence favorable to the defendant, its absence undermines confidence in the outcome of the trial.

3. On page 53, at the end of the first full paragraph, delete the text following the phrase "such that the evidence, if it exists, would" and insert the following text in its place:

(even considered collectively) reasonably undermine confidence in the outcome of the trial.

4. Also on page 53, in the last sentence of the second full paragraph, immediately following the phrase "Certainly such evidence," insert the following text:

even considered collectively with other evidence favorable to Barnett,

5. On page 54, in the first full paragraph, delete "Having failed to show the materiality of the evidence he seeks," and insert the following text in its place:

In a petition for rehearing, Barnett contends this court has "acted contrary to United States Supreme Court precedent" by "shifting the burden of establishing [the] materiality of [the] requested discovery from the prosecutor to [him]." He asserts that because only "[t]he prosecutor knows what [evidence] he possesses that is favorable," it is the *prosecutor's* duty to determine whether that evidence, considered collectively, is material. Thus, in Barnett's view, a defendant's only obligation in seeking *Brady* materials as part of a discovery motion under section 1054.9 is to "describe broad categories of evidence that would be favorable, if such existed"; the trial court must then "grant the discovery request," at which time "[t]he burden . . . will shift to the prosecutor to assess the materiality of all the favorable evidence."

We disagree that the approach Barnett advocates is mandated by federal constitutional law. It is true that, in the context of pretrial discovery, "the prosecution, which alone can know what is undisclosed, [is] assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached." (*Kyles v. Whitley*, *supra*, 514 U.S. at p. 437 [131 L.Ed.2d at p. 508].) But we are not dealing here with pretrial

discovery; rather, we are dealing with a motion for *postconviction* discovery, which is provided for and governed by California law. Nothing in the *Brady* line of cases requires us to place the burden of showing materiality on the prosecution in connection with a motion for postconviction discovery under state law. Indeed, such a motion involves federal constitutional principles under the *Brady* line of cases only indirectly. As we have explained, section 1054.9 allows a defendant to seek discovery of material to which he would have been entitled at time of trial, which includes material that was subject to the prosecutor's constitutional duty of disclosure under *Brady*. But we have also explained *Steele* makes clear that in making a motion for discovery under section 1054.9, it is *the defendant* who bears the burden of showing he would have been entitled at time of trial to the materials he is requesting. This necessarily means that when the defendant argues he was entitled to the materials at time of trial pursuant to the prosecutor's constitutional duty of disclosure, he bears the burden of showing both the favorableness and materiality of the evidence he seeks. If the defendant fails to show the evidence he is seeking is material, then he has failed to show he was entitled to that evidence at time of trial, which is a foundational requirement to discovery under section 1054.9.

In his petition for rehearing, Barnett also argues that requiring him to show materiality is contrary to *Steele* because *Steele* made clear that defendants "may use [section] 1054.9 as an investigative tool," "before they file a [habeas] petition."

In Barnett's view, requiring him to show the materiality of the evidence he is seeking "returns [defendants like him] to the . . . standard of discovery that the Legislature intended to modify" when it enacted section 1054.9.

We disagree. In *Steele*, the Supreme Court explained that section 1054.9 was intended to modify the rule from *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1257, 1261, which was "that the defendant had to state a prima facie case for [habeas] relief before he may receive discovery." (*In re Steele*, *supra*, 32 Cal.4th at p. 691.) Requiring the defendant to show the materiality of evidence he is requesting under section 1054.9 does not, as Barnett contends, resurrect the *Gonzalez* rule and require him to "prove his claim without discovery in order to get discovery." Under *Gonzalez*, the defendant had to be able to set forth in a habeas petition, under penalty of perjury, "specific facts which, if true, would require issuance of the writ" before a cause or proceeding would even exist in which discovery could be sought. (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1258.) Now, however, a defendant may simply file a motion for discovery under section 1054.9. Moreover, as we have explained, if the defendant seeks the discovery of materials on the ground he was entitled to them at time of trial because they fell within the prosecution's constitutional duty of disclosure, he must simply describe those materials with sufficient particularity to explain why -- assuming they exist -- they would have been both favorable and material and thus subject to disclosure.

Under the present system, the defendant need not have already developed a theory of habeas relief on which he can swear to the supporting facts under penalty of perjury. He must, however, at least have conceived of reasonably specific materials to which he would have been entitled at time of trial, which he can then describe in his motion for discovery under section 1054.9. While this does place a greater burden on him than Barnett might like, it is a burden compelled by section 1054.9 and our Supreme Court's decision in *Steele*.

Barnett also argues in his petition for rehearing that requiring him to show the materiality of the evidence he seeks is inconsistent with this court's conclusion that he does not have to prove the actual existence of that evidence, because it places a burden on him that is "equally as daunting." Again, we disagree. Describing evidence that, if it exists, would be both favorable and material, is far less difficult than proving the actual existence of such evidence. Indeed, Barnett illustrates how easy it is to imagine evidence that would be favorable and material when he hypothesizes the existence of a tape recording in which another person (Cantwell) confessed to the murder of which he was convicted.[19] The problem raised by this hypothetical is not the *difficulty* in imagining and describing such evidence, but rather the possibility that encouraging

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[19] At his murder trial, two defense witnesses testified that "it was Cantwell who arranged to have Eggett killed and defendant framed for the murder." (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1079.)

defendants and their habeas attorneys to imagine such evidence will "turn [section] 1054.9 discovery into a game."

We must assume that in the exercise of their duties to their clients *and* to the courts, habeas attorneys will not view discovery under section 1054.9 as a "game" and will not formulate discovery requests under that statute based on nothing more than pure imagination. But if a defendant and/or his attorney can imagine and describe materials to which the defendant would have been entitled at time of trial based on some plausible theory, then a request for such material would be proper under section 1054.9. Thus, for example, given the defense theory that Cantwell framed Barnett for Eggett's murder (which was already supported by the testimony of two witnesses), it would be appropriate for Barnett to request in a motion under section 1054.9 any materials tending to show that Cantwell was responsible for the murder. Such evidence is reasonably specific and, if it exists, would be favorable to Barnett. Moreover, Barnett would likely have little difficulty in persuading the court that the prosecution's failure to disclose further evidence of Cantwell's responsibility for the crime would tend to undermine confidence in Barnett's conviction. In any event, this showing of materiality would be far easier than proving any such evidence actually exists.

Thus, we reject Barnett's additional arguments and stand by our conclusion that when a defendant seeks discovery under section 1054.9 on the theory that he would have been entitled to the requested materials at time of trial under *Brady*, the

defendant bears the burden of establishing the materiality of the evidence he seeks.

We also stand by our conclusion that Barnett did not make the requisite showing here. In his petition for rehearing, he contends we have "misstate[d] the facts" in asserting he made no effort to show materiality, but it is he who is mistaken. In noting his lack of effort, we were referring to his *petition for mandamus relief in this court*, not to his underlying habeas petition, to which he now (belatedly) directs our attention. As we have explained, in seeking relief from this court it was *Barnett's* burden to demonstrate an abuse of discretion by the trial court (see *Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 566); accordingly, it fell to *Barnett* to convince us, *in his papers to this court*, that the materials he is seeking are materials to which he would have been entitled at trial. It was not our duty to search through Barnett's habeas petition, which is thousands of pages long, to find his explanation of why the evidence he seeks to discover is material. (See *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379 [appellate court has no duty to search the record].) On the contrary, it was Barnett's duty to present a fully developed argument to us about why he was entitled to the relief he sought, and that argument should have included a fully developed explanation of why he was entitled at time of trial to the materials he requested because those materials were both favorable and material under *Brady*. Having failed to offer such an explanation,

6. Because the foregoing insertion includes a new footnote 19, the current footnote 19 (on page 58) and all subsequent footnotes will need to be renumbered.

7. On page 72, in the first sentence of the last paragraph, delete the word “first” between “Barnett” and “cites.”

8. On page 73, at the beginning of the first sentence of the last paragraph, insert “The People contend” before “*Murtishaw*.” Also in that sentence, delete “, as the People point out,.” Delete the second sentence in that paragraph (continuing on to page 74), not including the footnote, and insert the following text in its place:

The rule in *Murtishaw*, however, does not strictly depend on whether the prosecution conducted such an investigation. Under *Murtishaw*, the trial court had discretion to permit Barnett access to “jury records and reports of investigations available to the prosecution.” (*People v. Murtishaw*, *supra*, 29 Cal.3d at p. 767.) Thus, regardless of whether the prosecution conducted an investigation that resulted in a report,

9. Renumber footnote 23 as footnote 24 and include it at the end of the new text added above, then add the following text immediately following the footnote:

Barnett was entitled to seek access to “jury records . . . available to the prosecution.” Such records would necessarily include the criminal records of the jurors, if any. And since *Murtishaw* refers to records *available* to the prosecution, and not just records in the possession of the prosecution, a

defendant can seek access to the jurors' criminal records under *Murtishaw* even if the prosecution has not sought to obtain those records itself.

Here, we believe that if Barnett had sought access to the criminal records of C.L. and L.F. under *Murtishaw*, based on a showing from his own investigation that C.L. "lied about his own criminal record" and that L.F. "concealed his own illegal drug use during the trial and his connections with criminals," it would have been an abuse of discretion for the trial court to have denied his request. Accordingly, we conclude he has shown he was entitled to those records at time of trial, and the trial court abused its discretion in denying his request for discovery of those records under section 1054.9.

To the extent Barnett's request was broader, seeking not only the criminal records of C.L. and L.F., but also the criminal records of their family members and those of the other trial jurors, and seeking more generally "information regarding any arrests or convictions and all criminal activity known to law enforcement for the trial jurors, especially [C.L.] and [L.F.] and their family members," Barnett has failed to show any entitlement to those records or that information under *Murtishaw*.

10. On page 74, delete the first full paragraph, then insert the following text at the beginning of the next paragraph:

Seeking other authority for such discovery,

11. On page 75, insert the following text at the end of the second sentence of the last paragraph:

, at least to the extent that request extends beyond the criminal records of C.L. and L.F.

12. On page 75, in the third sentence of the last paragraph, delete the text following the phrase "concealed from him," delete the fourth sentence of that paragraph (continuing on to page 76), and delete the first full paragraph on page 76. Insert the following text in place of the deleted text:

information about the bias of any of the jurors. We have concluded already that Barnett is entitled to the criminal records of C.L. and L.F. under *Murtishaw*, but Barnett has offered no authority supporting his request for any juror materials beyond those records (including but not limited to the criminal records of the family members of C.L. and L.F.).

For the foregoing reasons, we conclude the trial court abused its discretion when it denied Barnett's request for the criminal records of Jurors C.L. and L.F.

13. On page 85, insert a new footnote at the end of the first paragraph, as follows:

In his petition for rehearing, Barnett asserts he offered an explanation "[i]n his habeas corpus petition, which he lodged with the superior court and appended to his [mandamus] petition in this Court as an exhibit." As we have already pointed out, however, it was not our duty to cull the thousands of pages of Barnett's habeas petition to find the explanation that he should have offered directly to this court in his mandamus petition.

14. On page 109, in the Disposition section, renumber paragraph (2) as (3), and immediately preceding the word “and” at the end of paragraph (1) insert a new paragraph, as follows:

(2) the criminal records of trial Jurors C.L. and L.F.;

This modification changes the judgment.

Petitioner’s petition for rehearing is denied.

BY THE COURT:

SCOTLAND, P.J.

SIMS, J.

ROBIE, J.